82-1924

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ALEXANDER L. STEVAS,
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No.

IN THE SUPREME COURT UNITED STATES OF AMERICA

October Term 1982

ZDAN SENA,
Petitioner,

-vs-

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED FOR REVIEW

WHETHER PETITIONER'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED WHERE THE ASSISTANT UNITED STATES PROSECUTING ATTORNEY IN HIS CLOSING ARGUMENT STRONGLY SUGGESTED TO THE JURY THAT THEY DRAW AN ADVERSE INFERENCE AGAINST PETITIONER FOR HIS FAILURE TO PRODUCE A WITNESS WHOM THE PETITIONER WAS POWERLESS TO PRODUCE.

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OPINIONS BELOW

The opinions of the courts below are not reported.

The opinion of the United States Court of Appeals for the Sixth Circuit below is contained in its Order filed March 28, 1983 and is contained in Appendix A, infra.

JURISDICTION

Petitioner seeks to have reviewed the Order of the United States Court of Appeals for the Sixth Circuit which was entered on March 28, 1983.

The jurisdiction of this Court is invoked under 28 USC 1254 (1) and Supreme Court Rules 20.1.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

Amendment 5, Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Supreme Court Rule 20.1

A petition for writ of certiorari to review the judgment in a criminal case of

a state court of last resort or of a federal court of appeals shall be deemed in time when it is filed with the Clerk within 60 days after the entry of such judgment. A Justice of this Court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding 30 days.

28 United States Code 1254 (1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATEMENT OF THE CASE

On October 2, 1982, an Eastern District of Michigan Grand Jury indicted Petitioner and two others [1] for conspiracy to distribute and possession with intent to distribute cocaine (Count 1, 21 U.S.C. §841 (a) (1) and 21 U.S.C. §846) and distribution and aiding and abetting the distribution of cocaine (Count 11, 21 U.S.C. §841 (a) (1) and 18 U.S.C. §2).

Subsequent to the granting of Petitioner's Motion for Severence, a jury trial was had before Judge Charles Joiner on January 8, 1982. Immediately

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1. The grand jury also indicted Thomas E. Gaines and Deborah Taylor on these charges. Upon his plea of guilty to distribution of cocaine (21 U.S.C. §841 (a) (1), Gaines was sentenced to 18 months imprisonment and a three year special parole term. Upon her plea of guilty to conspiracy to deliver cocaine (21 U.S.C. §846), Ms. Taylor was sentenced to a two year term of probation.

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following the trial, Petitioner motioned for a mistrial which was denied. Thereafter on January 12, 1982, the jury returned a verdict of guilty against Petitioner on both counts and he was thereafter sentenced to concurrent three year terms of imprisonment.

On March 18, 1982, Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Sixth Circuit, claiming that error had occured in his trial when in closing argument, the Assistant U.S. Attorney strongly suggested that the jury draw an adverse inference against the Petitioner for his failure to call a witness. Subsequent to the filing of brief's and oral argument, the Appellate Court rendered an opinion affirming the conviction of Petitioner.

At the trial in the instant case, the Government relied upon the testimony of informant Thomas Gregory, who admitted having a prior felony breaking and entering conviction, and being hopeful of obtaining consideration at his sentencing on the above felony for his cooperation with law enforcement officials and for his testimony at trial in the instant case. Gregory testified that on June 23, 1981, he was acting undercover and met one, Thomas Gaines, whom Gregory had known approximately 2 years, near Gaines' home in Farmington Hills, Michigan. Gaines lived next door to Gregory's uncle, Jim Swearington, who along with Gregory had also been convicted of breaking and entering and who was acting in an undercover capacity with regards to the instant drug transaction. At their meeting, which occurred at or about 12:00 p.m.,

Gregory asked if Gaines could obtain some cocaine. Gregory indicated that he was interested in purchasing the cocaine for one, Randy Schnotala, a Michigan State Trooper, also acting in an undercover capacity. The two discussed a four ounce cocaine transaction, and Gaines "fronted" Gregory one gram of cocaine as a sample of the cocaine that Gregory would later be buying.

Schnotala arrived at the Swearington residence approximately three hours later that same day, at which time he gave Gregory $105.00 in payment for the fronted gram of cocaine, which Gregory paid to Gaines. Schnotala and Gregory then met with Gaines and his girlfriend, Debra Taylor, at the lot line between the houses, where the four ounce cocaine transaction was again discussed.

Gaines indicated to Schnotala that

he could obtain four ounces of cocaine for him at $2,400.00 per ounce. Gaines further apparently indicated to Trooper Schnotala that he was going fishing that night, that his source for the cocaine was not available, having already left for his job at the railroad, and that the deal might take place that evening if his girlfriend, Debra Taylor, was able to contact the source's girlfriend.

Although Gaines, who testified on behalf of Petitioner prior to his own trial, indicated that he may have told Schnotala and Gregory that his girlfriend might possibly handle the cocaine transaction on the 23rd, he stated that he had no intention of the transaction being handled that way. In fact, he testified that he had already obtained one ounce of cocaine from one Jim Jemmer

the day before, on June 22nd, and that he intended to sell that ounce to Schnotala only when the latter had his money together.

Nevertheless, following their discussion with Schnotala and Gregory, Gaines and Taylor left their residence in their car. They were followed by a surveillance crew headed by Detective Sergeant Robert Bertee. The surveillance crew tailed the couple to an area near Telegraph Road and Five Mile Road, where they lost them after the two entered into a subdivision.

Although at trial, the Government submitted proof that Petitioner lived in the area of Telegraph Road and Five Mile Road, Gaines testified that he did not go to Petitioner's house on the night of the 23rd. Instead, Gaines testified that he went to the house of one Carl

Tromane located in the same area and that he and Tromane went to Ohio that night to go fishing, returning to Michigan the next day early in the morning.

However, Taylor returned to Gaines' residence at approximately 4:00 p.m. on the 23rd. She indicated to Gregory that she had been unable to make the connection with their source, but would keep trying. Gregory testified that he and Schnotala waited until 6:00, when they indicated to Taylor that they would complete the transaction the next day.

On the 24th, at approximately 12:00 p.m., Gregory went to Gaines' house, and at that time Gaines indicated that he could obtain the four ounces but needed some time to make phone calls. Thereafter, Gregory called Schnotala and the latter arrived at Gregory's uncle's residence at approximately 4:00 in the

afternoon. Schnotala testified that prior to his arrival there, he checked out $10,000.00 at the police station for the purpose of purchasing the cocaine and marked $2,400.00 of that amount. Upon his arrival, he entered into a discussion with Gaines and Gregory, and Gaines allegedly indicated that his source would initially be bringing only one ounce of cocaine and that he would be riding a motorcycle.

Schnotala testified that while they were waiting for the cocaine to arrive, he did not feel trusted by Gaines. To reassure him, Schnotala flashed Gaines the $10,000.00 in his wallet.

At approximately 3:30, Petitioner arrived and pulled into Gaines' driveway. Allegedly, at the time Petitioner arrived, Gaines announced, "Here is my

man now, I guess he didn't ride his bike". Petitioner parked in the back of Gaines' house where he could not be seen by Schnotala and Gregory. Gregory testified that upon Petitioner's arrival, Gaines walked to his house and returned within five to ten minutes with a baggie containing a white substance. Schnotala and Gregory taste tested the substance, approved of it as cocaine, and Schnotala counted out $2,400.00 which he gave to Gaines. Gregory testified that Gaines pocketed the $2,400.00 and walked back to his house from where he returned after approximately 15 minutes.

Upon his return, Gaines apparently indicated that there was a problem in getting the other three ounces of cocaine and that his guy was waiting for a call from his dealer. While they waited,

Gaines allegedly walked to and from the houses approximately three times and during that time indicated to Schnotala that he (Gaines) could obtain 10,000 hits of mescaline which could be purchased for $750.00 per ounce. Schnotala left the area after indicating to Gaines that he needed to call his people before he could make the purchase, but returned within a few minutes and told Gaines that he would purchase the offered mescaline.

Gaines then allegedly left Gregory's uncle's residence to return to his house and shortly thereafter Petitioner was observed pulling out of Gaines' driveway at which time undercover officers moved in and arrested him.

Furthermore, the amount of money found on Petitioner at the time of his arrest was the subject of some controversy at trial. Gaine's

testified that he gave $2,300.00 to Petitioner to take from the house and Petitioner himself testified that he did not know how much money Gaine's gave him. Although Trooper Bertee testified that he took $2,200.00 of the marked money from Petitioner, Agent Dotsun, who took surveillance notes prior to the arrest, indicated that he didn't know if $2,400.00 or $2,200.00 was taken from Petitioner. Dotsun did admit that he was present at the arrest and that his report of the incident indicated that $2,400.00 was taken from Petitioner.

Thomas Gaines, in his testimony admitted stating to Schnotala and Gregory on the 24th that his man would be coming from the Telegraph and Five Mile area with the cocaine, but as noted above,he also testified that he had in fact obtained the cocaine on June 22nd, two days earlier.

Gaines testified that he waited until the 24th before he sold the cocaine to Schnotala, because it wasn't until then that Schnotala assured Gaines that he had the money to purchase the cocaine. Furthermore, Gaines testified that he waited for Petitioner to arrive before he sold the cocaine, because he was fearful of Gregory, being aware of Gregory's prior felony conviction and also having observed Gregory shoot guns carelessly in the past. As such, he wanted Petitioner nearby to provide protection when the transaction took place.

Petitioner testified that he did not sell cocaine to Gaines, that he went to Gaines house on June 24th so that Gaines could look at his car for possible repairs. Petitioner also indicated that when he arrived at Gaines house, Gaines told him that he was handling a matter next door

and that he would be a few minutes. Petitioner went into Gaines house, fell asleep on the couch and was awakened sometime later by Gaines. Petitioner testified that Gaines handed him a sum of money and instructed him to take the money away because his next door neighbors had guns and he was afraid that they would rip him off. Petitioner also testified that he assumed Gaines had obtained the money for insurance purposes and was not aware that it had come from the sale of cocaine.

In his closing argument, the Assistant U.S. Prosecuting Attorney, in part, argued as follows:

> "The Government's case as corroborated by the testimony of Gregory, Thomas Gregory and Schnotala that Gaines told, told them, not only on the 24th, but also -- not only the day Zdan Sena was there, but the day before, on June 23rd, that "his

man, his supplier worked for the railroad." And low and behold, guess where Zdan Sena works?

Gaines and Gregory told Schnotala not only on the 24th, once again the day that Zdan Sena was there, but also on the 23rd, that the man lived in the area of Five Mile and Telegraph. Surprise, surprise, where does Zdan Sena live? Somebody else lives there, brought out by Mr. Gaines this morning, his good fishing buddy lives over there and that's where they were going on the 23rd when Detective Sargeant Bertee who was tailing him lost Gaines and Taylor. Where is the fishing buddy, why didn't he testify --"

As noted above, after the trial, Defense council motioned for a mistrial which the court denied.

ARGUMENT

In his closing argument to the jury, the Assistant U.S. Prosecuting Attorney, in effect, asked the jury to draw an adverse inference against the Petitioner for his failure to produce a witness whom the Petitioner was powerless to produce. In so doing, without obtaining advance approval from the trial court, the prosecutor violated a sanctioned rule of practice and further violated Petitioner's due process rights by depriving him of a fair trial.

In Graves v. United States, 150 U.S. 118, 14 S. Ct. 40, 37 L. Ed. 1021 (1894), this Court states the rule that where a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction at issue, the failure to produce such witnesses creates the presumption

that the testimony, had it been produced, would have been unfavorable to that party. The rationale behind the creation of the presumption was stated as follows:

> But when pretty stringent proof of circumstances is produced tending to support the charge, and it is apparent that the accused is so situated that he can offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocense and he fails to offer such proof, if produced, instead of rebutting, would tend to support the charge.

Graves v. United States, supra, 150 U.S. at 120, 14 S. Ct. at 42, 37 L. Ed. at 1023.

Yet Graves and other Courts recognized

that the presumption [1] created by the above so-called "missing witness" rule should be narrowly applied, only after certain requirements were met. Indeed, it was understood that:

> The missing witness "inference" is based not on the bare fact that a particular person is not produced as a witness, but on his non-production when it would be natural for (a party) to produce the witness if the facts known by him had been favorable.

U.S. V. Young, 463 F.2d. 934 at 946 (1972) (footnotes omitted).

Therefore, the corollary to the missing witness rule developed that before a party can raise to the jury the possibility of drawing an adverse inference from the failure to call a witness or before the court can instruct the jury that they may

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1. The missing witness rule as presently recognized only authorizes a permissible inference, not a presumption as the Graves court allowed.

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make such an inference, it must be determined that the missing witness was peculiarly within the other party's power to produce and that the missing witness' testimony would elucidate issues of the case. United States v. Young, 463 F.2d 934 (D.C. Cir. 1972); Burgess v. Unites States, 440 F. 2d 226 (D.C. Cir. 1970); United States v. Blakemore, 489 F.2d 193 (6th Cir., 1973). Without the above findings, neither argument or instruction to the jury regarding the missing witness is proper.

Furthermore, in some circuits, a rule of practice has developed that an advance ruling from the trial court should be obtained before counsel for either side is allowed to argue to the jury that an adverse inference should be made against the other side for the failure to produce witnesses with relevant

testimony which that party could have produced at trial. See Gass v. United States, 135 U.S. App. D.C. 11, 19, 416 F. 2d 767, 775; United States v. Blakemore, 489 F. 2d 193, 196 (6th Cir., 1973). An advance request allows the trial court to determine if the missing witness argument or instruction is appropriate. As previously stated:

> In the ligitation at bar, as certainly in a great many instances of missing witnesses, there might have been reasons why the absent witness was not called. Here, as on other occasions, those reasons, if revealed to the court, conceivably might have dispelled any notion that the failure to call was an implied admission of weakness in the party's case. Where there are such reasons, and they are produced and satisfy the trial judge on plausibleness, the judge should decline a request for a missing witness instruction, and should also forbid adverse comment to the jury on the absence of the witness.

Burgess v. United States, supra, at 237-38 (footnotes omitted).

In United States v. Blakemore, supra, the Court of Appeals, for the Sixth Circuit reversed the conviction of the Defendant charged with possession of a sawed-off shotgun, where although the prosecutor obtained advance permission from the trial court to comment in argument to the jury that Defendant's failure to call four prospective witnesses gave rise to an inference that their testimony would be unfavorable to the Defendant, the trial court failed to make the necessary determinations, i.e. whether the witnesses were peculiarly within Defendant's power to produce and that their testimony would elucidate the transaction.

In the instant case, although the prosecutor did not directly ask the jury

to make an adverse inference against Petitioner for his failure to produce a witness, Carl Tromane, the prosecutor certainly strongly suggested that the jury do so. His comments were as follows:

> Gaines and Gregory told Schnotala not only on the 24th, once again the day that Zdan Sena was there, but also on the 23rd, that the man lived in the area of Five Mile and Telegraph. Surprise, surprise, where does Zdan Sena live? Somebody else lives there, brought out by Mr. Gaines this morning, his good fishing buddy lives over there and that's where they were going on the 23rd when Detective Sargeant Bertee who was tailing him lost Gaines and Taylor. Where is the fishing buddy, why didn't he testify --"

Clearly, the prosecutor's argument above had the same effect on the jury as if he had directly asked them to draw an adverse inference against the Petitioner. As noted by the Court in United States v. Young, supra, at 943 n.16:

> We are not so clear concerning Judge Fahy's distinction which would permit some comment in counsel's argument on the fact that a witness is missing so long as he stopped short of saying that an inference could be drawn that the testimony of the absent witness would be adverse to the other side had he been called. Whether or not a lawyer explicitly uses the word "inference," when his comment, as in argument to the jury, emphasizes the fact that witnesses were not called by the other party, he is, ordinarily at least, in fact arguing to the jury that they may conclude that the testimony of these witnesses, would be adverse to the party who failed to call them.

Yet, in the instant case, the prosecutor did not seek an advance ruling from the trial court to so argue to the jury. Furthermore, had he sought an advance ruling, it is clear that his request would have been denied. The missing witness, Carl Tromaine was not peculiarly

within Petitioner's power to produce. In fact, Petitioner testified that he did not even know the man. Furthermore, as counsel for Petitioner indicated in his motion for mistrial following the trial, Thomas Gaine's testimony relating to the existence of the missing witness, Carl Tromane, took trial counsel by surprise. In that Gaines' testimony and the prosecutor's closing arguments took place on the same day, Petitioner hardly had time to subpoena the missing witness.

There is no question that Tromane's testimony would have shed light on Petitioner's allegation that Thomas Gaines went to Tromane's house on the night of June 23rd, rather than to Petitioner's house located in the same area. Nevertheless, with his closing argument, the prosecutor, in

effect, had the jury penalize the Petitioner for his failure to produce a witness, Tromane, whom the Petitioner did not know, whose name the Petitioner first heard on the last day of trial and whom Petitioner was powerless to produce.

Furthermore, although in its final instructions to the jury, the trial court indicated that Petitioner had no burden to produce witnesses, the court did not instruct or caution the jury at the point error occurred when it could have most effectively been cured. See Berger v. United States, 295 U.S. 78 at 89, 79 L Ed 1314 at 1321, 55 S. Ct. 629 at 636 (1935).

Finally, the prosecutor's prejudicial statement in his closing argument to the jury certainly can not be found harmless. This was a case where one of the alleged co-conspirators, Thomas Gaines, testified

prior to his own trial and contrary to own penal interest on behalf of Petitioner. Gaines testified that he did not obtain the cocaine from Petitioner, that he obtained the cocaine from one Jim Jemmer on June 22nd - two days before the 1 ounce cocaine transaction complained of was completed, and that the gram of cocaine he sold to Thomas Gregory on June 23rd came from the same ounce he sold on the 24th. That assertion was supported by the evidence, in that the ounce of cocaine sold on the 24th was approximately one gram short.

The case against Petitioner was for the most part circumstantial, with the only direct evidence being that money was found in his pocket at the time of his arrest approximately one hour after the sale of cocaine took place.

Furthermore, the amount of money found

on Petitioner at the time of his arrest was the subject of some controversy at trial period, Gaines testified that he gave $2,300.00 to Petitioner to take from the house and Petitioner himself testified that he did not know how much money Gaine's gave him. Although Trooper Bertee testified that he took $2,200 of the marked money from Petitioner,Agent Dotsun, who took surveillance notes prior to the arrest, indicated that he didn't know if $2,400 or $2,200 was taken from Petitioner. Dotsun did admit that he was present at the arrest and that his report of the incident indicated that $2,400 was taken from Petitioner.

Petitioner testified that he did not sell the cocaine to Thomas Gaines, that he was present in the area at the time the transaction occurred for a wholly innocent purpose, to have his car looked at by Gaines who had done mechanical work for Petitioner in the past, and that

he (Petitioner) had marked money in his possession only because Gaines had given it to him to take away from the house, Gaines explaining that he did not trust the people next door and feared they would rob him.

Therefore, the Government's case against Petitioner was not strong and the prejudice to Petitioner resulting from the prosecutor's error was consequently magnified. Reviewing a case having similar characteristics, this Court has stated:

> Indeed, the case against Berger, who was convicted only of conspiracy and not of any substantive offense as were the other defendants, we think may properly be characterized as weak - depending, as it did, upon the testimony of Katz, an accomplice with a long criminal record.
>
> In these circumstances prejudice to the cause of the accused is so highly probably that we are not justified in assuming its non-existence. If the case against Berger had been strong, or, as some courts have said, the evidence of his guilt

"overwhelming," a different conclusion might be reached.

Berger v. United States, supra, 295 US at 89, 79 L. Ed at 1321 55 S.Ct. at 636.

Reviewing the issue of whether counsel should be required to obtain advance approval from the trial court before he is allowed comment to the jury regarding the other party's failure to call a witness is necessary in that there is presently a split among the federal circuits as to whether such rule of practice is required.

Most notably, in United States v. Coven, 662 F.2d 162 (2nd Cir., 1981) and in United States v. Passaro, 624 F.2d 938 (9th Cir., 1980) it was held that the prosecutors' comments on a defendant's failure to present witnesses was proper, so long as they are not phrased so as to call attention to such

defendant's own failure to testify.

Neverless, as noted above, in United States v. Young, supra, United States v. Mahone, 537 F.2d 922 (7th Cir., 1976) and in United States v. Blakemore 489 F.2d 193 (6th Cir., 1973), it was stated that prosecutorial comment on failure to produce a witness is proper only where the witness is peculiarly within a defendant's control and the witness' testimony would elucidate the transaction in question. Further, that such comment is allowed only after an advance ruling is obtained.

It is Petitioner's position that the above split should be resolved in favor of requiring an advance ruling from the trial court before comment on the failure to produce a witness is allowed. To allow such comment, where the defendant is powerless to produce the missing witness, as in the instant case, is extremely

prejudicial and denies a defendant his due process right to a fair trial.

Finally, although the Federal Court of Appeals for the Sixth Circuit follows the above "advance ruling" approach, it was errantly applied in the instant case. There the court held that the prosecutor by his comments did not ask the jury to draw an adverse inference against Petitioner for his failure to produce Carl Tromane as a witness. Nevertheless, it is respectfully submitted that the prosecutor's comments were extremely prejudicial, that such a rhetorical question as raised by the prosecutor to the jury, raises as much an adverse inference as if the label itself were to have been used.

CONCLUSION

WHEREFORE, Petitioner Zdan Sena prays that this Petition be granted, that his convictions be reversed, and that this matter be remanded to the United States District Court for the Eastern District of Michigan, Southern Division, to allow him a new trial on the charges.

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Dated: May 27, 1983

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APPENDIX A - Order of the United States Court of Appeals for the Sixth Circuit which contains its opinion entered on March 28, 1983.

No. 82-1333

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA	)	
Plaintiff-Appellee	)	
	)	ORDER
vs.	)	
ZDAN SENA	)	
Defendant-Appellant	)	

Before: CONTIE and KRUPANSKY, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

The defendant, Zdan Sena, appeals from convictions for conspiracy to distribute cocaine and aiding and abetting in the sale of cocaine. The sole issue raised on appeal is whether the prosecutor committed reversible error in commenting, without first seeking advance permission from the trial court, on the defendant's

failure to call a favorable witness. United States v. Blakemore, 489 F.2d 193 (6th Cir. 1973). We find no reversible error and affirm the convictions.

On June 23, 1981, a police informant arranged a sale of cocaine between an undercover policeman and Thomas Gaines. The sale price was $2,400 an ounce with Gaines receiving $200. Gaines told the undercover policeman that the buy would have to be delayed because Gaines' supplier was at work and Gaines was going fishing. Gaines also told the policeman that the supplier worked for the railroad and lived in the Five Mile and Telegraph area in Detroit.

That afternoon, Gaines and his girlfriend, Deborah Taylor, drove to the Five Mile and Telegraph area. Police surveillance lost the car in this area. Taylor returned alone and told the undercover policeman that the buy would have to wait until the next day.

On June 24, 1981, the buy was arranged. Gaines met with the undercover policeman and the informant at the informant's uncle's house next door to Gaines' house. Gaines said that his supplier would first bring one ounce of cocaine. If satisfactory, three more ounces would be delivered. Gaines then stated that his supplier drove a motorcycle. At this point, a car pulled into Gaines' drive-way next door. Gaines said " There's my man, I guess he didn't ride his bike." The defendant was the only person in the car. Gaines went to his house and returned with one ounce of cocaine which he sold for $2,400. Gaines left again and then returned to arrange a further deal. On the pretext of checking with superiors to confirm the second drug buy, the undercover policeman called his office to notify them that the defendant would be

leaving soon.

Gaines went to his house again and then returned, stating that his supplier was leaving to get the drugs. At that point, the defendant began to drive his car out of Gaines' driveway. Police officers moved in and arrested the defendant. $2,200 in marked bills was found in the defendant's pocket. The other $200 used in the buy was found on Gaines. It was established that the defendant worked on the railroad and lived in the Five Mile and Telegraph area.

Gaines, Taylor and the defendant were indicted. The defendant's case was severed and he was tried first. He testified that he went to Gaines' house to have his car fixed and that he fell asleep on the couch. When he woke up, Gaines gave him a wad of money to hold.

He testified that he put the money in his pocket and left.

Gaines corroborated the defendant's testimony. He said that the defendant was not his supplier and that he only gave the defendant the proceeds from the drug buy for safekeeping. Gaines admitted that he did go to the Five Mile and Telegraph area on June 23 but not to see the defendant. He said that he went to pick up Carl Tromane to go fishing. Tromane did not testify.

In rebuttal argument, the prosecutor attacked the defendant's contention that Gaines went to see Tromane rather than the defendant on June 23. He stated to the jury "Where is the fishing buddy, why didn't he testify . . ." The defendant objected and no further mention was made of Tromane's failure to testify. No curative instruction was requested or

given but the district court did instruct the jury three times in closing instructions that "the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence."

On appeal, the defendant argues that the prosecutor's argument was improper in that it invited the jury to infer that Tromane was not called to testify because his testimony would not have supported Gaines' story.

Arguing to the jury that an adverse inference should be drawn from the defendant's failure to call a witness is proper only if the witness is peculiarly within the defendant's control and his testimony would elucidate the transaction. Blakemore, 489 F.2d at 195. Before making such an argument, the government must obtain advance permission from the trial

court. United States v. Martin, 696 F.2d 49, 52 (6th Cir. 1983); United States v. Beeler, 587 F.2d 340, 343 (6th Cir. 1978), cert. denied, 454 U.S. 860 (1981). Since no advance ruling was sought in this case, the defendant contends that his convictions should be reversed.

We disagree. We find that Blakemore was not violated because the prosecutor did not ask the jury to draw any adverse inferences from the defendant's failure to call Tromane. Martin, 696 F.2d at 52. Unlike Blakemore and Beeler, where the prosecutor directly asked the jury to draw adverse inferences, the argument in this case was indirect.

Even if the argument in this case did violate Blakemore, we find that the error was harmless beyond a reasonable doubt. A number of factors lead us to this conclusion. First, the comment was isolated and indirect. Second, the comment was

directed to the collateral matter of whether Gaines went fishing on June 23. Even if we were to assume that he did go fishing on the 23rd, it does not exclude the possibility that he also met with the defendant. Furthermore, it has little bearing on the events of June 24 when the cocaine was sold. Third, the district court clearly instructed the jury three times that the defendant had no burden to call witnesses or produce evidence. While a prompt curative instruction would have been preferable, the repeated and forceful instructions in this case clearly impressed upon the jury that the defendant had no burden to call any witnesses. Fourth, we find the evidence of the defendant's guilt to be substantial. Gaines said that his supplier worked for the railroad and lived in the Five Mile and Telegraph area. That is

where the defendant worked and lived. When the defendant drove his car into Gaines' driveway, Gaines identified him as the supplier. Whenever Gaines had to get the drugs or arrange further details of the buy, he went back to his house. The defendant was in Gaines' house at these times. When the second deal was set and Gaines said that his supplier was leaving to get the drugs, the defendant left Gaines' house. The one ounce of cocaine was sold for $2,400 with $200 to go to Gaines. The defendant was arrested with $2,200 in marked bills in his pocket while Gaines had the rest of the proceeds.

We find that all of the above factors combine to render any Blakemore violation harmless beyond a reasonable doubt.

Accordingly, the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

END OF DOCKET